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The West Virginia Constitution and Taxation

J. Timothy Philipps*

When that "primordial protoplasmal atomic globule" first divided itself into two, it was probably because a revenue agent demanded half.¹

I. INTRODUCTION

The author perhaps was being only half facetious when he wrote the sentence quoted above; for if there is one function with which we are all occupied and which seems to pervade so many of our activities it is that of taxation. Taxation has been defined as "the exercise of the power of government to exact economic contributions from those under its control, in order to meet government expenses or for other purposes."² The compulsory aspect of taxation is probably what most of us find disagreeable about it. In addition, tax laws often present the taxpayer with bewildering complexity, and constitute a nuisance in carrying on his daily business affairs. Still, taxes are necessary and even good if equitably applied. In the words of Oliver Wendell Holmes, Jr., "Taxes are what we pay for civilized society. . . ."³ It is, therefore, apparent that the questions of who

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F. Richard Hall and J. Davitt McAteer were my research assistants during preparation of this article and helped in its completion.

¹ Peairs, *General Principles of Taxation*, 6 TAX L. REV. 267, 271 (1951).

² *Id.*; "A tax payment consists of a compulsory transfer of purchasing power . . . to the government. . . ." V. ALVIS, *THE WEST VIRGINIA GROSS SALES TAX* 49 (1960). "A tax is a compulsory contribution exacted by governments from private individuals. . . ." Spengler, *The Property Tax as a Benefit Tax*, in *VIEWPOINTS ON PUBLIC FINANCE* 44 (H. Groves ed. 1947) [hereinafter cited as *VIEWPOINTS*].

³ *Compania de Tabacos v. Collector*, 275 U.S. 87, 100 (1927). (dissenting opinion). The story goes that Mr. Justice Holmes on hearing a secretary exclaim, "Don't you hate to pay taxes!" was rebuked heatedly with the response, "No, young feller. I like to pay taxes. With them I buy civilization." F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 42-43 (1938). It is interesting to note that Holmes was apparently a supporter of Andrew Mellon's "trickle-down" theory of taxation. In a letter to Sir Frederick Pollock he said that he had read "a good little book on Taxation by the Secretary of the Treasury." He added, "I believe Congress has turned him and his ideas down. I think they seemed right to me." 2 HOLMES-POLLOCK LETTERS 137 (M. Howe ed. 1941). The "good little book" he referred to was Mellon's *Taxation, The People's Business* (1924). See L. EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 5-6 (1961).

should pay this compulsory "price" and how it should be paid are of utmost importance to everyone.

With the total tax burden in the United States absorbing nearly 30 percent of the gross national product, issues of tax policy have reached an urgent stage throughout the nation.⁴ The British historian C. Northcote Parkinson (originator of the eminently perspicacious Parkinson's Law)⁵ has said that when taxes reach 35 percent of gross national product there is "a visible decline in freedom and stability," and at 36 percent "there is disaster, complete and final though not always immediate."⁶ That statement is probably a bit of hyperbole, since in all likelihood there is no universal point at which a tax system necessarily breaks down;⁷ rather, the most important factor is the quality of the tax system as opposed to the aggregate burden it imposes. A poorly constructed tax system can produce great damage even though the total tax burden is not great, while a well designed one can gather large amounts of revenue without causing significant detriment.⁸ Nevertheless, the total burden imposed is a factor to be considered in evaluating tax policy decisions, and it seems only logical that this factor becomes more important as the aggregate tax burden increases.

No one needs to be told that the total tax load in the United States has been increasing at a fast pace in recent years. Most of the publicity in this regard has been directed at the level of federal taxation; however the burden of state and local taxation has also been rising at an accelerated rate. In fiscal year 1955 state and local governments collected \$23.5 billion in taxes.⁹ Ten years later in fiscal 1965 the figure was \$51.2 billion.¹⁰ For calendar year 1968 taxes collected by state and local governments in the United States totaled \$73.2 billion.¹¹ This was an increase of \$9.0 billion, or

⁴ See, e.g., TIME, April 4, 1969 at 85. By comparison taxes absorb 41% of Sweden's gross national product, 39% of France's, and 35% of Germany's. *Id.*

⁵ "Work expands so as to fill the time available for its completion." C. N. PARKINSON, PARKINSON'S LAW AND OTHER STUDIES IN ADMINISTRATION 2 (1957).

⁶ Quoted in TIME, *Supra* note 4 at 85.

⁷ See D. T. SMITH, FEDERAL TAX REFORM 4 (1961).

⁸ *Id.*

⁹ See J. HELLERSTEIN, STATE AND LOCAL TAXATION 12 (1969) citing Census Bureau data.

¹⁰ *Id.*

¹¹ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, QUARTERLY SUMMARY OF STATE AND LOCAL TAX REVENUE No. 4, March, 1969 at 1. For fiscal year (as opposed to calendar year) 1968 the figure was \$68.9 billion. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, GOVERNMENTAL FINANCES IN 1966-67 at 2 (1968).

13.9 percent from a year earlier.¹² That is rapid acceleration by anyone's definition. In fact, a harried taxpayer might drolly wonder whether the rate of acceleration could be approaching the point where it is sufficient to escape the earth's gravity.

West Virginia has followed this national trend of increased state and local tax collections. For the fiscal year ending June 30, 1959, total state and local taxes collected in West Virginia amounted to approximately \$267 million.¹³ For the fiscal year ending June 30, 1967, the figure was \$402 billion.¹⁴ In light of the sales tax measures enacted at the 1969 Regular Session of the West Virginia Legislature, the trend toward increasing state and local taxation is likely to continue, at least in the near future;¹⁵ and if current rates of increase are projected into years to come, the anticipated levels of taxation are, to say the least, food for thought.

Because of the increasing quantitative impact of state and local taxation in West Virginia, there has been a great deal of discussion about it. Concrete action, however, has not been proportionate to the amount of discussion. The history of taxation in West Virginia seems to be that it grew up like Topsy. Stopgap and finger-in-the-dike measures enacted on an ad hoc basis to meet particular needs or crises have largely been the rule.¹⁶ Comprehensive reform programs have been put forth,¹⁷ and some specific proposals have been enacted;¹⁸ however a complete reform of the whole tax structure has never been undertaken.

¹² *Id.*

¹³ WEST VIRGINIA STATE TAX STUDY COMMISSION, WEST VIRGINIA TAXES 43-44 (Final report 1960) [hereinafter cited as TAX STUDY COMMISSION FINAL REPORT].

¹⁴ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, GOVERNMENTAL FINANCES IN 1966-67, Table 17 at 33 (1968).

¹⁵ See Comm. Sub. for S.B. 164, W. Va. Leg., Reg. Sess. 1969 (passed March 4, 1969, effective April 1, 1969); CCH W. VA. STATE TAX REP. ¶ 93-101 to 163.

¹⁶ See C. DAVIS, E. ELKINS, C. FRASURE, M. REEVES, W. ROSS, A. STURM, WEST VIRGINIA STATE AND LOCAL GOVERNMENT 187 (1963) [hereinafter cited as WEST VIRGINIA STATE AND LOCAL GOVERNMENT]; e.g., Acts of the 35th W. Va. Leg. ch. 110, Reg. Sess. (1921) [hereinafter cited as Acts] (forerunner to present business and occupation tax); Acts ch. 66, 2d Ex. Sess. (1933) (forerunner to present consumers sales tax); Acts ch. 155, Reg. Sess. (1961) (present personal income tax).

¹⁷ E.g., The by-now famous (or notorious depending upon one's point of view) proposals made by Professor James A. Papke. See Reports of James A. Papke to Joint Committee on Government and Finance of the West Virginia Legislature dated July 10, Aug. 17, Aug. 22, and Sept. 12, 1966 (on file in West Virginia University College of Law Library) [hereinafter cited as Papke Report with applicable date].

¹⁸ E.g., the corporate net income tax, Acts ch. 97, Reg. Sess. (1967), grew out of the general debate raised by Papke's proposals. See Papke Report, Aug. 17, 1966 at 2.

The specific subject of this paper is the West Virginia constitution as it affects taxation in the state. In the hope of avoiding misunderstanding, the discussion should be prefaced with certain disclaimers. First, the writer does not believe that constitutional change is either a necessary or a sufficient condition for substantial improvement of the West Virginia tax structure, although some changes would be helpful. There are wide areas of possible ameliorative action within the confines of the present constitution.¹⁹ Second, in the writer's opinion, any proposed change in the state and local tax structure is necessarily limited by the fact of the federal government's substantial activities in the field of revenue gathering.²⁰ As a practical matter the large amounts of money collected by the federal government restrict the state and local governments in the amounts of revenue they can raise. It is also likely that the federal government's pervasive presence in the field has acted in practice as a limitation on the kinds of revenue the state and local governments have attempted to raise, that is, the kind of taxes which these governments have imposed.²¹ Third, there are no panaceas in the area of state and local tax policy, either from the standpoint of a change in the constitution or the standpoint of a change in the statutory law. Any system of laws, whether it be concerned with taxation or any other field, will by the very fact of its generality necessarily admit of inequities in individual cases.²² Finally, there seems to be a tendency among some writers on law reform to be stricken with a rather severe case

¹⁹ See, e.g., Papke Reports, *supra* note 17, *passim*.

²⁰ It was estimated in President Johnson's budget that federal revenues will total \$186.1 billion in fiscal year 1969 and \$198.7 billion in fiscal year 1970. The Budget Message of the President, 1970, 115 Cong. Rec. S195, S197 (daily ed. Jan. 15, 1969). At this writing President Nixon has not indicated that he intends to recommend any legislation which would significantly lower these estimates. The changes advanced in his tax reform messages would largely cancel each other out insofar as their effect on total federal revenues is concerned. See Message from the President on Reform of Our Federal Income Tax System, 115 Cong. Rec. H2810 (daily ed. April 21, 1969); Message from the President on Extension of the Income Tax Surcharge, 115 Cong. Rec. H2221 (daily ed. March 26, 1969).

²¹ See WEST VIRGINIA STATE TAX STUDY COMMISSION, AN APPRAISAL OF THE WEST VIRGINIA TAX SYSTEM 10 (Second report 1960) [hereinafter cited as TAX STUDY COMMISSION SECOND REPORT].

²² The reason is that a general system of law is the product of a process of abstraction. This consists of elimination of elements considered non-essential in formulating a general rule applicable to particular cases intended to fall within the rule's scope; but the process is an imperfect one, and an element considered non-essential when the general rule was formulated may in a particular case turn out to be essential. In such a situation the general rule of law does not adequately deal with the individual case and inequity results from its application. See J. SALMOND, JURISPRUDENCE § 16, at 45-46 (7th ed. 1924).

of hubris when putting forth their proposals. This is natural enough, since one would not ordinarily expend the effort to present proposals unless he felt his judgments and conclusions were correct. Nevertheless, the present writer wishes to disavow any such pretensions for his own suggestions. In matters of tax policy, as in other questions of the rightness and wrongness of human activity, the conclusions one reaches are ultimately grounded in judgments of value which can neither be proven nor disproven, but depend rather on subjective affirmations of propositions as self-evidently true or false.²³ The words of the State Tax Study Commission with regard to the question of what is fair and equitable remain as true today as when they were written in 1960: "The different opinions . . . are about as numerous as the number of taxpayers."²⁴ Therefore, any suggestions or proposals made here should be taken not as certain propositions, but rather as tentative hypotheses, for "certainty generally is illusion, and repose is not the destiny of man."²⁵

II. THE WEST VIRGINIA CONSTITUTION

In the broadest sense it may be said that every provision of the state constitution affects taxation, since every one in some sense deals with government, thereby affecting its costs, and in turn having an effect on the revenue gathering apparatus. Some provisions, however, have a more direct effect than others, and it is these with which this paper will deal. If one were to start with a clean slate to devise a set of constitutional provisions dealing with taxation and finance, one would probably include as little in it as possible, thereby leaving the legislature a wide discretion in formulating a suitable tax system for the state and local governments.²⁶ However, in the matter of tax policy for 1969, the state of West Virginia is not dealing with a *tabula rasa*, and it appears that it would be impracticable to put into effect the ideal of minimal constitutional mandates in the area of taxation.

²³ See generally R. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 3-26, 61-115 (1959).

²⁴ TAX STUDY COMMISSION SECOND REPORT 10.

²⁵ Holmes, *The Path of The Law*, 10 HARV. L. REV. 457, 466 (1897).

²⁶ See, e.g., NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION art. VII at 15 (6th ed. 1963) [hereinafter cited as MODEL CONSTITUTION]. "Ideally, some authorities believe, a state constitution should be silent on matters of taxation and finance, thus giving the legislature and the governor complete freedom to develop fiscal policies to meet current and emerging requirements." *Id.* at 91; Kresky, *Taxation and Finance*, in SALIENT ISSUES OF CONSTITUTIONAL REVISION 136 (National Municipal League, J. Wheeler ed. 1961) [hereinafter cited as SALIENT ISSUES].

We are not working in a vacuum but rather within the context of a given set of laws, traditions and attitudes. As is true of so many theoretically impeccable propositions in the area of government, this particular ideal falls short when applied to a concrete situation. To draw an analogy from another field of endeavor, it might be compared to the 1967 Pittsburgh Pirates—unbeatable on paper but superabundantly fallible on the field.

For these reasons no attempt will be made here to present a comprehensive plan for complete reform or elimination of the West Virginia constitutional provisions affecting taxation; rather certain specific suggestions will be made which it is hypothesized would result in, or at least facilitate, an improved tax system in West Virginia. The suggestions deal with the constitutional mandate for a capitation tax,²⁷ earmarking of state revenues in the constitution,²⁸ the questionability of the Legislature's power to incorporate prospectively by reference amendments to the Federal Internal Revenue Code into the state's income tax laws, limitations on the power of the state to make direct grants to certain local units,²⁹ and the tax limitation amendment.³⁰ No attempt will be made to deal with other provisions of the constitution dealing with taxation and finance such as equality and uniformity requirements,³¹ provisions for charitable,

²⁷ W. VA. CONST. art. X, § 2.

²⁸ W. VA. CONST. art. VI, § 52, art. X, § 2, art. XII, §§ 4-5.

²⁹ W. VA. CONST. art. X, § 6.

³⁰ W. VA. CONST. art. X, § 1.

³¹ *Id.* For a treatment of the equality and uniformity requirement of W. VA. CONST. art. X, § 1, adroitly attempting to reconcile the leading case of *In re Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959) with the prior West Virginia cases in the field see Note, *Equality and Uniformity in Property Taxes*, 62 W. VA. L. REV. 70 (1959). The court in *Kanawha Valley Bank* held that systematic and deliberate assessment of one species of property at a higher valuation than other species of property in the taxing unit was in violation of the equality and uniformity requirement of art. X, § 1. This decision seemed to be contrary to a line of prior cases. See *Western Md. Ry. v. Bd. of Pub. Works*, 141 W. Va. 413, 90 S.E.2d 438 (1955); *In re Nat'l. Bank*, 137 W. Va. 673, 73 S.E.2d 655 (1952); *Bankers Pocahontas Coal Co. v. County Court* 135 W. Va. 174, 62 S.E.2d 801 (1950); *In re Charleston Fed. Sav. & Loan Ass'n*, 126 W. Va. 506, 30 S.E.2d 513 (1944); *In re Hancock Sav. & Loan Ass'n*, 125 W. Va. 426, 25 S.E.2d 543 (1943); *Christopher v. James*, 122 W. Va. 665, 12 S.E.2d 813 (1940); *Charleston & South Bridge Co. v. Kanawha County Court*, 41 W. Va. 658, 24 S.E. 1002 (1896). For the latest discussion of the uniformity requirement of W. VA. CONST. art. X, § 9 by the West Virginia Supreme Court of Appeals see *City of Moundsville v. Steele*, 164 S.E.2d 430 (W. Va. 1968).

religious, public welfare, and other exemptions,³² or the various financial management mandates.³³

A. *Capitation Tax Mandate*³⁴

The West Virginia constitution provides that the Legislature must "levy an annual capitation tax of one dollar upon each male inhabitant of the State who has attained the age of twenty-one years"³⁵ Perhaps this provision is one of the consequences of the general distrust of state legislatures which arose during the nineteenth century, resulting from many excesses and abuses on the part of the law-making bodies of that era. This popular distrust caused many state constitutions to be loaded with cumbersome detail.³⁶ The capitation tax mandate appears to be an anachronism left over from that time. It provides little revenue,³⁷ and violates the basic principle that a sound constitution should be confined to fundamental matters.³⁸ If the writer may be permitted to engage

³² [P]roperty used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including live stock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation; household goods to the value of two hundred dollars shall be exempted from taxation. W. VA. CONST. art. X, § 10.

For a comprehensive article on this provision see Abel, *Public and Public Welfare Property Tax Exemption in West Virginia*, 55 W. VA. L. REV. 171 (1953). W. VA. CONST. art. X, § 1a exempts bank deposits and money from property taxes. See W. VA. CODE ch. 11, art. 5, § 10a.

³³ E.g., article X, § 3 dealing with procedures to be followed in drawing money from the state treasury; and the modern budget amendment, art. VI, § 51.

³⁴ For a concise discussion of this and other provisions of the West Virginia constitution regarding taxation see LEAGUE OF WOMEN VOTERS, A STUDY OF THE WEST VIRGINIA CONSTITUTION, TAXATION AND FINANCE (undated).

³⁵ W. VA. CONST. art. X, § 2.

³⁶ See A. STURM, MAJOR CONSTITUTIONAL ISSUES IN WEST VIRGINIA 4-5, 13 (1961), [hereinafter cited as MAJOR CONSTITUTIONAL ISSUES]; Keefe, *The Functions and Powers of the State Legislatures*, in STATE LEGISLATURES IN AMERICAN POLITICS 47-52 (American Assembly, A. Heard ed. 1966).

³⁷ The capitation tax provided to be collected by W. Va. Code ch. 11, art. 7, § 1 (at a rate of \$2 per each male person over the age of 21 years with certain exceptions) produced \$698,000 or .218% of all state taxes in fiscal year 1968. CCH W. VA. STATE TAX REP. ¶ 650.

³⁸ See SALIENT ISSUES *passim*; MAJOR CONSTITUTIONAL ISSUES 8. To bring this point home Professor Sturm quotes Chief Justice John Marshall:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, required that only its great outlines be marked, its important objects designated, and the minor ingredients which composed those objects be deduced from the nature of the objects themselves. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

in some gauchery of language, the capitation tax mandate is about as unfundamental as something can get. There is simply no reason for the constitution to compel the Legislature to collect such an inconsequential tax. This is true regardless of the attitude one may have with regard to other constitutional mandates to the Legislature in the field of taxation.

B. Earmarking of State Revenues

The constitution requires that revenues "from gasoline and other motor fuel excise and license taxation, motor vehicle, registration and license taxes," and other revenues derived from "motor vehicles or motor fuels" be "appropriated . . . solely for construction, reconstruction, repair and maintenance of public highways."³⁹ It also earmarks certain listed revenues for the support of free schools.⁴⁰ In light of the principle that constitutions should ordinarily deal only with matters of a fundamental nature, it appears that these provisions are inappropriate for inclusion.⁴¹ Earmarking of revenues for specific purposes should be a function of statutes not the constitution, if it is thought to be desirable at all. The elected policy-makers of a state, the members of the legislature and the governor, should be given sufficient flexibility to ascertain the public needs and the amount of revenue needed to provide for them without hampering constitutional restrictions.⁴²

In addition to this, some authorities in the field of public finance and government disapprove of earmarking in any event, whether it be by constitutional or statutory mandate.⁴³ It is said that dedication of revenues necessitates the setting up of special funds which unduly complicate financial administration, and that "division of revenues among a number of funds . . . renders more difficult the

³⁹ W. VA. CONST. art. VI, § 52.

⁴⁰ W. VA. CONST. art. XII, §§ 4-5.

⁴¹ See authorities cited *supra* note 38.

⁴² Kresky, *Taxation and Finance in SALIENT ISSUES* 137-38.

⁴³ A. STURM, *THE NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA* 46 (1950) [hereinafter cited as *NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA*]. For examples of some of the legal problems which have arisen under article VI, 552 see *State ex rel Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965) (reimbursement to public utilities for removal of facilities in connection with interstate highway program); *Charleston Transit Company v. Condry*, 140 W. Va. 651, 86 S.E.2d 391 (1955) (seat mile tax imposed on passenger buses by municipalities); *State ex rel State Road Comm'n v. O'Brien*, 140 W. Va. 114, 82 S.E.2d 903 (1954) (pledging of money from the constitutional road fund for payment of interest and principle on bridge revenue bonds).

task of the Legislature. . . .⁴⁴ The argument concludes that placing all revenue in a general fund instead of earmarking it gives a legislature wider scope and consequent flexibility in providing for the needs of a state.⁴⁵ There is much logic in this argument, and at least one state has adopted its conclusions.⁴⁶ However, as a matter of practical politics a state administration or legislature may find it necessary, or at least expedient, to specify that additional funds from proposed tax raises or new taxes will be used for certain defined purposes in order to win public acceptance of the measure;⁴⁷ and it may further be necessary or expedient to write this specification into law.⁴⁸ Therefore, there may be situations, as mentioned before, where practical necessities come into conflict with the ideal. In such cases sacrificing the ideal may well be the most desirable course of action, at least from a short-range point of view.⁴⁹ In West Virginia it has been estimated that approximately two-thirds of all state income is earmarked by the constitution, by statute, or by the requirements of federal grants-in-aid.⁵⁰

Regardless of the attitude one takes toward the desirability of earmarking revenues by statute,⁵¹ there seems to be no compelling reason in the ordinary situation why this should be accomplished by constitutional mandate. Therefore, the requirements for earmarking

⁴⁴ NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 46.

⁴⁵ *Id.* at 47.

⁴⁶ Alaska Const. art. IX, § 7 provides:

The proceeds of any state tax or license shall not be dedicated to any special purpose, except when required by the federal government for state participation in federal programs.

⁴⁷ For example, the recent "temporary" removal of certain exemptions from the consumers sales tax was justified on the ground that the added revenues would be used for an across-the-board increase in salaries for public school teachers. Revenues from the consumers sales tax are by statute to be "devoted to the support of the free schools. . . ." W. VA. CODE ch. 11, art. 15, § 30 (Michie 1966). However, this has been held to be a more legislative direction and proceeds derived from the consumers sales tax (and the use tax, *See* W. VA. CODE ch. 11, art. 15A, § 26) are considered to be part of the general revenue fund. *See* Bd. of Educ. v. Bd. of Pub. Works, 144 W. Va. 593, 109 S.E.2d 552 (1959).

⁴⁸ *E.g.*, W. VA. CODE ch. 11, art. 17, § 26 (additional cigarette tax for support of schools).

⁴⁹ This might be generalized into a law in the style of Parkinson's *supra* note 5: Expediency is seldom sacrificed for the sake of principle.

⁵⁰ WEST VIRGINIA STATE AND LOCAL GOVERNMENT 183. A perusal of former Governor Smith's Budget Document (Governor Moore's was unavailable at the time this article was written), for Fiscal Year 1970, Table I at IV indicates that the statement holds substantially true to the present.

⁵¹ In some cases it might be argued that earmarking is justified on a benefit theory of taxation; for example, the dedication of gasoline taxes to the state road fund. *See generally* R. MUSGRAVE, *supra* note 23, at 61-89.

of funds in article VI, section 52 and article XII, sections 4 and 5 of the West Virginia constitution should be eliminated.

C. Prospective Incorporation By Reference

In recent years there has been a movement by the states to adopt state income tax statutes based on the federal income tax laws.⁵² The advantages of such a procedure are obvious. The taxpayer's tasks of tax planning and computation are simplified, because he has to take into account only one set of basic laws rather than two. Moreover, the state administrators have the advantage of the federal interpretative apparatus and audit machinery. Federal income tax returns are open to inspection by duly authorized state tax administrators,⁵³ and states may enter into agreements with the Internal Revenue Service for coordination of federal and state tax administration.⁵⁴ In addition, states may provide by statute for reporting within a certain period of time any adjustments made in a taxpayer's federal taxable income by the Internal Revenue Service or other competent authority.⁵⁵ Administration of state personal income taxes is, therefore, simplified from the standpoint of both the taxpayer and the state tax authorities by conformity provisions. It eases reporting by the taxpayer and tightens enforcement by the state.

Many states have achieved conformity with the federal law by the technique of incorporation by reference.⁵⁶ This involves enactment of a statute which in some way adopts part or all of the federal statute into the state law.⁵⁷

An old and settled principle of law states that a legislature can-

⁵² See generally J. HELLERSTEIN, STATE AND LOCAL TAXATION 592-602 (1969); Kamins, *Federally Based State Income Taxes*, 9 NAT'L TAX J. 46 (1956).

⁵³ INT. REV. CODE OF 1954 § 6103(b); Treas. Reg. § 1.6103(b)-1 (1961).

⁵⁴ See Treas. Reg. § 1.6103(b)-1 (1961); 8A J. MERTENS, FEDERAL INCOME TAXATION § 47.57 (P. Zimet rev. ed. 1964); 5 P-H 1969 FED. TAXES ¶ 35443; 5 CCH 1969 STAND. FED. TAX REP. ¶ 5209.57. West Virginia has entered into such an agreement. Announcement 62-101, 1962 INT. REV. BULL. NO. 48 at 11; CCH WEST VIRGINIA STATE TAX REP. ¶ 18-408.

⁵⁵ E.g., W. VA. CODE ch. 11, art. 21, § 59. The taxpayer must report such adjustment within 90 days "after the final determination of such change, correction, or renegotiation, or as otherwise required by the tax commissioner. . . ."

⁵⁶ See J. HELLERSTEIN, *supra* note 52, at 599-601.

⁵⁷ E.g., W. VA. CODE ch. 11, art. 21, § 9. For a general treatment of the legislative technique of incorporation by reference see Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941).

not abdicate its law-making power to any other body or authority.⁵⁸ Pronouncements of this principle may be grounded on constitutional provisions granting the law-making power to the legislature, or requiring a separation of powers.⁵⁹ Its significance for the present discussion is that it has sometimes been used as a basis for attacking the validity of legislative enactments which have incorporated laws of other jurisdictions by reference.⁶⁰

This brings into question the practice of adopting federal income tax laws into state statutes by reference. When the foreign law (used in the sense of a law enacted by some other law-making body) is adopted as it exists at the time of the incorporation by reference, the validity of the technique is almost universally upheld.⁶¹ Therefore, incorporation by reference of an existing federal tax law should be valid. For example, in *Featherstone v. Norman*,⁶² the court was called upon to determine the validity of a Georgia income tax law which provided for imposition of a tax on net income "after making such deductions as are allowed by the laws of the United States."⁶³ The court interpreted the provision to mean that the Georgia tax was to be computed according to the federal tax law as that law existed at the date of enactment of the Georgia statute,⁶⁴ even though the wording of the Georgia provision could just as easily have lent itself to the interpretation that it was meant to incorporate future amendments of the federal law as well as the law existing at the date of its enactment. Having so interpreted the Georgia statute, the court found no trouble in upholding it as a valid incorporation by reference of the federal tax law.⁶⁵

⁵⁸ One of the settled maxims in constitutional law is, that power conferred upon the legislature to make laws cannot be delegated to that department or any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed.

1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1924).

See *State ex rel Winter v. Brown*, 143 W. Va. 617, 625, 103 S.E.2d 892, 896 (1958) saying, "As a general rule, it can be stated that the legislature cannot delegate its power to legislate."

⁵⁹ E.g., *State ex rel Winter v. Brown*, 143 W. Va. 617, 103 S.E.2d 892 (1958), *Commented on*, 61 W. VA. L. REV. 78 (1958).

⁶⁰ See 1 J. SUTHERLAND, STATUTORY CONSTRUCTION § 310 (F. Horack ed. 1943).

⁶¹ *Id.*

⁶² 170 Ga. 370, 153 S.E. 58 (1930); *accord*, *In re Opinion of the Justices*, 95 N.H. 540, 64 A.2d 322 (1949); *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922).

⁶³ *Featherstone v. Norman*, 170 Ga. 370, 372, 153 S.E. 58, 60 (1930).

⁶⁴ *Id.* at 394, 153 S.E. at 70.

⁶⁵ *Id.*

Although it is well established that a legislature can incorporate existing federal law or the law of another jurisdiction into its own law by reference, it is on shakier ground when it attempts to incorporate an existing law by reference, and also to incorporate prospectively any amendments to the incorporated federal or state law.⁶⁶ Thus a state which attempted to incorporate relevant provisions of the Internal Revenue Code and *future amendments to it* would run a substantial risk of having its income tax law declared unconstitutional. This is a risk which many states have been unwilling to take, since invalidation of an entire year's income tax could present grave fiscal problems.⁶⁷ Therefore, some states have taken the safe course by incorporating relevant provisions of the Internal Revenue Code as they exist at a certain date, and then updating the state law periodically by adopting intervening amendments to the federal law.⁶⁸ This of course means that the state law will of necessity fall behind the federal law, and to that extent diminish the benefits of conformity.⁶⁹

⁶⁶ Where the local legislation is contingent upon the enactment of a statute of another state or of Congress, some courts have held the statutes invalid. And more have held the adoption of prospective legislation in other states and in Congress an unconstitutional delegation. 1

J. SUTHERLAND, *supra* note 60, § 310.

See Annots. 133 A.L.R. 401 (1941); 166 A.L.R. 516 (1947); 42 A.L.R.2d 797 (1955). In *Dawson v. Hamilton*, 314 S.W.2d 532 (Ky. 1958), a Kentucky statute attempted to set uniform time standards for the state by adopting standards prescribed "by act of Congress or by order of the Interstate Commerce Commission." The court held the statute to be an invalid attempt to delegate legislative power, stating that it was unconstitutional to the extent that it adopted "time standards to be fixed in the future by the Federal Congress or the I.C.C. . . ." *Id.* at 536. Several other cases have held attempts at prospective incorporation by reference invalid. *See, e.g.,* *Cheney v. St. Louis Southwestern Ry.*, 239 Ark. 870, 394 S.W.2d 731 (1965); *Crowley v. Thornbrough*, 226 Ark. 768, 294 S.W.2d 62 (1956); *State ex el Kirschner v. Urquhart*, 50 Wash. 2d 131, 310 P.2d 261 (1957).

⁶⁷ J. HELLERSTEIN, *supra* note 52, at 600. *See also* Note, *Constitutional Questions Raised by Montana's New Income Tax Law*, 17 MONT. L. REV. 203 (1956).

⁶⁸ *See* J. HELLERSTEIN, *supra* note 52, at 599-601.

⁶⁹ This is not to say that all states have been so cautious, or that those who have been bold enough to adopt the federal law prospectively have been unsuccessful. A notable example of success occurred in *Alaska Steamship Company v. Mullaney*, 12 Alas. 594, 180 F.2d 805 (9th Cir. 1950). The court was called upon to decide the validity of Alas. Stats. § 43.20.300 which provided in part:

The provisions of the Internal Revenue Code as now in effect or *hereafter amended* . . . are incorporated in this chapter by reference and have effect as though fully set out in this chapter. (emphasis added).

The taxpayer contended that the statute constituted an invalid delegation of the legislative power in violation of the Alaska Organic Act. (Alaska was not

West Virginia has adopted this course of action. At the time of the enactment of the state personal income tax law arguments were made in the Legislature that incorporation by reference of even the existing Federal Internal Revenue Code might be unconstitutional.⁷⁰ If there was apprehension of the possible unconstitutionality of incorporating existing law by reference, a fortiori there was doubt regarding the constitutionality of prospective incorporation.⁷¹ It thus appears that the present method of conforming the state personal income tax to the federal law by periodically adopting the Internal Revenue Code as of a certain date was the result of doubt on the part of the Legislature as to whether the method of prospective incorporation would be constitutional. As a result, the state personal income tax law⁷² has lagged behind the federal law and to that extent the beneficial effects of conformity have been diminished.⁷³

yet a state at the time.) Although technically it did not have to decide the question, the court said that the prospective incorporation was valid. There was no invalid delegation of the legislative power. The device of prospective incorporation by reference was not a mere labor-saving device for the legislators, but was undertaken to achieve a uniformity which was in itself an important part of the legislative scheme. *Id.* at 616, 180 F.2d at 816. Apparently since Alaska has achieved statehood, the *Alaska Steamship* holding has not been seriously challenged. See *Hickel v. Stevenson*, 416 P.2d 236 (Alas. 1966).

In *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), a similar provision of the Nebraska income tax law was challenged. The court relying heavily on a recent amendment to the Nebraska constitution authorizing an income tax, NEB. CONST. art. VIII, § 1B, upheld the law stating:

The adoption of a state income tax based upon present and future federal income tax laws does not constitute a waiver of the sovereignty of the state, nor an abdication of its functions. . . . *Id.* at 400, 155 N.W.2d at 327.

⁷⁰ See, e.g., JOURNAL OF THE WEST VIRGINIA HOUSE OF DELEGATES, 1961 Reg. Sess. at 1758-59 (remarks of Mr. Buch). The constitutionality of the West Virginia personal income tax was upheld on other issues in *Tanner v. Premier Photo Service*, 147 W. Va. 37, 125 S.E.2d 609 (1962).

⁷¹ Cf. *State ex rel Winter v. Brown*, 143 W. Va. 617, 622, 103 S.E.2d 892, 894 (1958): "[T]he general power of taxation is vested exclusively in the legislative branch of the government of this State."

⁷² Although the discussion is in terms of the state personal income tax, it should be equally applicable to the conformity provisions of the corporate net income tax, W. VA. CODE ch. 11, art. 24, §§ 1-40 (Michie supp. 1968).

⁷³ For example, Acts ch. 60, 1st Ex. Sess. (1968) incorporated the definitions of federal law as of January 1, 1968. Prior to that, the applicable date of incorporation was Nov. 27, 1964. See CCH WEST VIRGINIA STATE TAX REP. § 15-055. S.B. 282, W. Va. Leg., Reg. Sess. (1969) moved the applicable date up to Jan. 1, 1969. It can be seen that between Nov. 27, 1964 and Jan. 1, 1968 there was a time lag of over three years; and even with the latest incorporation as of Jan. 1, 1969, the 1969 tax liability of West Virginia income taxpayers will be determined under what is in effect the 1968 Federal law unless the Legislature again moves up the applicable incorporation date in 1970. In addition, it should be noted that apparently the West Virginia

There seems to be no good reason why the Legislature should not have the power to conform the state income tax statutes to the federal law prospectively. Surely this would not constitute any dangerous grant of power to the Legislature. If an amendment to the federal law was considered undesirable, an appropriate adjustment could be made to the state statute. Such power would substantially promote the goal of conformity which West Virginia apparently accepted when it adopted its personal income tax. Therefore, the constitution should be changed to grant the Legislature power to conform the state's income tax statutes with the federal law prospectively.

D. Granting the Credit of the State

Article X, section 6 of the West Virginia constitution provides, among other things, that:

The credit of the State shall not be granted to, or in aid of any city, township, corporation, or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, township, corporation or person. . . .

Apparently this provision was inserted into the constitution primarily to prevent the practice which had obtained earlier in Virginia of lending the state's credit to counties, or to internal development projects such as railroads, canals, toll bridges, roads and turnpikes; and which had resulted in many abuses.⁷⁴ One would find it difficult to believe that a provision carrying such a relatively innocuous purpose could have engendered the detrimental progeny which it has. Although many cases have been decided under article X, section 6, only a few merit discussion for purposes of this paper.

During 1933, in response to the fiscal crisis brought about by the tax limitation amendment⁷⁵ the Legislature passed an enabling act⁷⁶

personal income tax never has adopted the minimum standard deduction provisions of the Federal Internal Revenue Code, INT. REV. CODE of 1954 § 141(c). See W. VA. CODE ch. 11, art. 21, § 14.

⁷⁴ State *ex rel* Appalachian Power Co. v. Gainer, 149 W. Va. 740, 759, 143 S.E.2d 351, 364 (1965). See generally 3 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 189-99 (C. Ambler, F. Atwood, W. Mathews ed. undated). For a short summary of the section's history see *Berry v. Fox*, 114 W. Va. 513, 516-19, 172 S.E. 896, 898-99 (1934).

⁷⁵ See text accompanying notes 135-54 *infra*.

⁷⁶ Acts ch. 62, 2d Ex. Sess. (1933).

under the terms of which funds from the general revenues were appropriated to meet debt service requirements of counties, schools, magisterial and other taxing districts, except municipalities, incurred prior to November 8, 1932.⁷⁷ The court held that this statute violated article X, section 6, because in enacting it the state had attempted to "assume, or become responsible for" the debts of local units. The statute clearly (said the court) was in contravention of the express requirements of the second clause of section six.⁷⁸ In addition, the court stated that the statute was a violation of the due process clause of the fourteenth amendment to the United States Constitution.⁷⁹ The reasoning in this connection was that "the using of state funds to pay local debts . . . would place upon the plaintiff [who lived in a district which would not benefit from the challenged provisions of the statute] the burden of paying debts in the contracting whereof he had no voice, and from which he derived no benefit."⁸⁰

Although the effect of this decision was something less than salutary, because it limited the state government in its choice of action with regard to aiding local units in alleviating their financial plight, there was still some cause for optimism. The *Berry* decision seemed to have been grounded on the second clause of section 6 and that apparently left room for maneuver under the first clause. Moreover, the *Berry* majority had stressed what it considered the unfairness of indirectly compelling citizens of one local unit to pay the debts of another through the medium of state taxation, in conjunction with assumption of debts by the state.⁸¹ This appeared to indicate that a state appropriation to local units which did not involve the assumption of debt might be upheld.⁸² This hope seemed to

⁷⁷ Date of ratification of West Virginia's tax limitation amendment by the voters.

⁷⁸ [A]t least to the extent of the appropriations sought to be made by the Act, the legislature is proposing to have the state assume or become responsible for the debts of local units. This is the very thing which the Constitution says may not be done. *Berry v. Fox*, 114 W. Va. 513, 524-25, 172 S.E. 896, 902 (1934).

⁷⁹ *Id.* at 526, 172 S.E. at 902.

⁸⁰ *Id.* at 527, 172 S.E. at 903. The court's apparent ability to localize so precisely the benefits of public services was wondrous indeed.

⁸¹ This notion may appear a bit quaint to us at the present time, in light of various revenue sharing proposals that have been enacted and are being proposed at the federal level.

⁸² The issue of direct state aid to school districts must be distinguished from aid to other local units here because W. VA. CONST. art. XII, § 5 expressly provides that the state shall provide for the support of free schools. See *Berry v. Fox*, 114 W. Va. 513, 525-26, 172 S.E. 896, 902 (1934),

be realized in two subsequent cases in which state and local co-operation on a financial level in various public service activities was held valid, on the ground that these activities were the primary responsibility of the state.⁸³

The optimism vanished, however, with the bombshell of *State ex rel Charleston v. Sims*.⁸⁴ In 1941 the Legislature had enacted a statute providing in effect for \$600 thousand per year in state aid to municipalities to be paid out of liquor profits.⁸⁵ In 1947 the law was amended slightly but its effect remained the same.⁸⁶ Among the provisions of the 1947 law was one to the effect that "amounts paid to municipalities is [sic] paid for the purpose of reimbursing the municipalities for their expenditures in enforcing state laws for the protection of life and property."⁸⁷ Apparently, this was included with the intention of relying on the *Kenny* and *State Board of Aeronautics* cases as a basis for upholding the statute. This reliance proved to be misplaced. The *State ex rel Charleston* case held the legislation invalid because it was contrary to the provisions of article X, section 6 of the West Virginia constitution.⁸⁸ The court said that the direct appropriation of funds to local units for local unit purposes was equivalent to the state's granting credit to them.⁸⁹ The *Kenny*

⁸³ In *Kenny v. County Court*, 124 W. Va. 519, 21 S.E.2d 385 (1942), the court upheld state-county participation in the welfare function stating that welfare is primarily the function of the state and art. X, § 6 does not "prohibit the state from exercising its own prerogatives, and from using the county courts as agencies in carrying out its own purposes. . . ." It concluded that the amount the state "contributes to the county general relief . . . is not lending the credit of the state to the county." *Id.* at 527, 21 S.E.2d at 389 (emphasis added). In *State ex rel Board of Aeronautics v. Sims*, 129 W. Va. 694, 41 S.E.2d 506 (1947), the court approved state aid to counties and municipalities for construction, improvement, or maintenance of airports and landing fields, but warned in accordance with *Berry* that the state could not assume an existing indebtedness of a county or municipality created in connection with such facilities. The court stated:

Admittedly, the Legislature cannot pay the debts of a county or municipality incurred in connection with an airport or other public improvement; but we see no reason why it may not, in the promotion of the public interest throughout the State, extend aid to such counties and municipalities, without being held to have paid their debts or assumed their liabilities. *Id.* at 699, 41 S.E.2d 509 (emphasis added).

See also *State Road Comm'n. v. County Court*, 112 W. Va. 98, 163 S.E. 815 (1932).

⁸⁴ 132 W. Va. 826, 54 S.E.2d 729 (1949).

⁸⁵ Acts ch. 71, Reg. Sess. (1941).

⁸⁶ Acts ch. 13, Reg. Sess. (1947).

⁸⁷ *Id.* In 1949 the Legislature had raised the amount of aid to \$1 million, Acts ch. 8, Reg. Sess. (1949), but *State ex rel Charleston v. Sims* intervened before the statute could take effect.

⁸⁸ *State ex rel Charleston v. Sims*, 132 W. Va. 826, 54 S.E.2d 729 (1949).

⁸⁹ *Id.* at 842, 54 S.E.2d at 738.

and *State Board of Aeronautics* cases were distinguished on the ground that they involved payments for purposes which were primarily the responsibility of the state, while in *State ex rel Charleston* the payments were to the municipalities in their capacities as such, and were intended to be used for municipal purposes.⁹⁰ The statement in the statute that the payments were reimbursement to the municipalities for expenses incurred by them in the enforcement of state law did not change this conclusion.⁹¹

One may quibble endlessly about the reasoning of *State ex rel Charleston*. Certainly "giving money" is not ordinarily thought to mean the same thing as "granting credit."⁹² One might even argue that the court was more influenced by its own governmental philosophy than by the internal logic of the case.⁹³ There is no argument, however, over the fact that the decision has seriously hampered state efforts to ameliorate the financial problems of the local governments in West Virginia.⁹⁴ There is little doubt that this situation should be corrected. Definite constitutional authority should be given the Legislature to make appropriations directly to the local units for local purposes. This is an especially pressing need in view of the financial plight in which the local units find themselves because of restrictions on their taxing powers.⁹⁵

⁹⁰ *Id.* at 849-50, 54 S.E.2d at 741-42.

⁹¹ *Id.* at 847-49, 54 S.E.2d at 741.

⁹² The writer must admit that on first reading *State ex rel Charleston*, he was so taken back that he wondered whether he had read the case correctly. This was with full knowledge of the facility courts often show for making words mean what they want. The case reminds one of Humpty-Dumpty's admonishment that "When I use a word it means just what I choose it to mean—neither more nor less." Quoted in F. HORACK, *LEGISLATION* 229 (1954). It is ironic that at the time of the decision in *State ex rel Charleston*, municipalities were [and still are, see W. VA. CODE ch. 8, art. 4, § 13a (Michie 1966)] authorized to impose a tax on the sales of state liquor stores within their boundaries. See Acts. Ch. 115, Reg. Sess. (1947). The anomalous situation thus exists whereby a municipality may tax the sale of liquor by the state; but the state is forbidden to appropriate revenues from that same activity to the municipalities.

⁹³ See *State ex rel Charleston v. Sims*, 132 W. Va. 826, 852, 54 S.E.2d 729, 743 (1949). "The plan heretofore followed by the Legislature does not commend itself as sound. . . ."

⁹⁴ See NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 47-48. See generally File, *Financial Responsibilities of West Virginia Municipalities*, 52 W. VA. L. REV. 208 (1950).

⁹⁵ A municipal government can exercise only those powers expressly granted or fairly implied from such grant. *Hyre v. Brown*, 102 W. Va. 505, 135 S.E. 656 (1926). A city has no inherent power to tax and can do so only when this power is delegated to it by the legislature. *Neal v. City of Huntington*, 151 W. Va. 1051, 158 S.E.2d 223 (1967); *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 143 W. Va. 800, 105 S.E.2d 260 (1958), *commented on*, 61 W. VA. L. REV. 226 (1959); *Walker v. City*

Furthermore, the problem may become more acute in future years if proposals now being made for block grants from the federal government to the states are enacted into law. The essence of such plans is the distribution by the federal government to the states each year of a specified percentage of aggregate net taxable income (or net income taxes paid) for a given year without any strings attached, such as is now the case with federal grants-in-aid.⁹⁶ Such an approach to alleviating the financial problems of state and local governments has been advanced by such eminent economists as Walter Heller and Joseph Pechman.⁹⁷ Although none of the proposals has as yet been enacted into law, there is a strong possibility that some form of block-grant revenue sharing with the states will become a reality within a few years. President Nixon has gone on record as favoring such proposals and has committed his Administration to their enactment in some form.⁹⁸ With a broad base of support among both "conservatives" and "liberals," and the backing of the present Administration, federal revenue sharing looms as a distinct possibility, if not probability. This is so even though Chairman Wilbur D. Mills of the House Ways and Means

of Morgantown, 137 W. Va. 289, 71 S.E.2d 60 (1952); *Hukle v. City of Huntington*, 134 W. Va. 249, 58 S.E.2d 780 (1950); *City of Fairmont v. Bishop*, 68 W. Va. 308, 69 S.E. 802 (1910). Under W. VA. CONST. art VIII, § 24, counties have authority to lay and disburse levies under such regulations as may be prescribed by law. See *Meador v. County Court*, 141 W. Va. 96, 87 S.E.2d 725 (1955); cf. *State ex rel County Court v. Battle*, 147 W. Va. 841, 847, 131 S.E.2d 730, 734 (1963) (stating that art. VIII, § 24 indicates "considerable retention of powers over counties by the legislature."). W. VA. CONST. art. XII, § 5 provides for delegation of the taxing power to school districts, contingent on a favorable vote of the people. See *State ex rel Winter v. Brown*, 143 W. Va. 617, 103 S.E.2d 892 (1958), *commented on*, 61 W. VA. L. REV. 78 (1958). In addition to the general limitations stated above, local units are also limited by the tax limitation amendment, W. VA. CONST. art X, § 1. It has been said that the decision in *State ex rel Charleston* fell most heavily on the smaller municipalities. GOVERNOR'S COMMISSION ON STATE AND LOCAL FINANCE, TAX FACTS IN WEST VIRGINIA 41 (1954) [hereinafter cited as TAX FACTS].

⁹⁶ See J. HELLERSTEIN, *supra* note 52, at 18-22. A plan returning 10% of federal net income taxes paid would have yielded \$5.6 billion to the states in 1966. *Id.* at 21.

⁹⁷ *Id.* For a comprehensive survey of federal revenue sharing plans see SUBCOMMITTEE ON FISCAL AFFAIRS OF THE JOINT ECONOMIC COMMITTEE, 90th CONG., 1st SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM? (Compendium 1967). For a short treatment of such plans in non-technical language see FORTUNE, March, 1969, at 92-93.

⁹⁸ See Message from the President on Reform of Our Federal Income Tax System, 115 CONG. REC. H2810, H2811 (daily ed. April 21, 1969) in which the President stated that his Administration was "committed" to a program of "Revenue sharing with State and local governments."

Committee has indicated that he is something less than enthusiastic about the concept.⁹⁹

The problem that a program of sharing federal revenue with the states would raise in light of *State ex rel Charleston* is fairly evident. A revenue sharing program which allocates money to the states (but not to local governments), would make the financial position of the local units of government no better than it would have been without such a program, if the state is unable to find a way to get the shared revenues down to the local governments. This is precisely the problem in West Virginia. If a federal revenue sharing program is enacted, the state would, on account of the interpretation of article X, section 6 in *State ex rel Charleston*, find it extremely difficult or impossible to take advantage of the program in a manner that would provide much needed financial assistance to the local governments. It is true that some indirect means might possibly be devised to put part of the money in the hands of the local governments,¹⁰⁰ but the simplest solution would be an amendment to the constitution permitting direct appropriations to local units by the state.¹⁰¹

In addition to what has been said with regard to federal revenue sharing, it should be emphasized that this is not the only argument for changing the present law. Inability to grant state aid to local governments is detrimental to both the state and the localities. The localities find it impossible to gather needed revenue in the face of statutory, constitutional, and practical political limitations on their taxing power, while the whole state is concomitantly weakened by

⁹⁹ See Washington Post, April 25, 1969, at A16, col. 4-5. The hostility to federal block grants is not insubstantial. In addition to Congressman Mills, the concept has also met with opposition from such disparate groups as the NAM and AFL-CIO. J. HELLERSTEIN, *supra* note 52, at 21-22.

¹⁰⁰ For example, in the case of municipalities, the state might authorize an increase in the business and occupation tax rates permitted to be imposed by a municipal government. The rate increase would be in an amount estimated to yield the sum of federally shared revenues in which the state wanted the municipalities to participate. Then it could enact a credit against the state business and occupation tax for amounts of municipal business and occupation taxes paid as a result of the raise in municipal rates. The net effect of this, if the municipalities took advantage of the increased rate authorization (and there would be strong pressure to do so on account of the credit mechanism) would be increased revenues in the hands of the municipalities with no increase in the aggregate of state and municipal business and occupation taxes paid. Under such a plan might the tax-credit mechanism be interpreted as in violation of art. X, §6?

¹⁰¹ *E.g.*, HAWAII CONST. art. VII, § 3 provides "the legislature shall have the power to apportion state revenues among the several political subdivisions."

the problems of the localities, especially the municipalities.¹⁰² If the state were able to grant direct aid to localities, the revenue gathering apparatus of the state could be used to collect indirect taxes, supplanting the conglomeration of local taxes and fees now in effect. Hopefully, these indirect taxes could take the form of increased taxes on net income of individuals and business entities. The local units could thus take advantage of the tax administrative machinery of the state, while the state would be doing likewise with the federal tax gathering apparatus.¹⁰³

Therefore, it appears imperative that this provision be changed. In the writer's opinion it is the most compelling proposal for change in West Virginia's constitution as it affects taxation. It is also one that the writer believes would stand a fair chance of being adopted, although contrary opinions as to the feasibility of adoption were expressed during the conference at which this paper was delivered.

*E. The Property Tax Limitation Amendment*¹⁰⁴

The property tax limitation amendment should be retained in its

¹⁰² See authorities cited note 94 *supra*.

¹⁰³ See text accompanying notes 52-73 *supra*.

¹⁰⁴ W. VA. CONST. art. X, § 1. The subject of the tax limitation amendment is inextricably intertwined, first with the whole question of the appropriateness of the use of property as a tax base, and second with the most general issues of public finance and taxation. To do it justice would require a treatise, not a short essay such as this. Therefore, the author disclaims any pretensions to exhaustiveness of coverage here; rather a selected set of facts and propositions will be presented which it is hoped will throw some light on the subject for the reader. For an early history of property taxation in West Virginia see O. LAMBERT, *WEST VIRGINIA AND ITS GOVERNMENT* 353-74 (1951). For discussions of some of the technical legal aspects of property taxation in West Virginia see Brown, *Changes in West Virginia Real Property Tax Law*, 66 W. VA. L. REV. 271 (1964); Note, *Constitutional Aspects of Tangible Property Assessments*, 68 W. VA. L. REV. 300 (1966). The relevant parts of art. X, § 1 are as follows:

Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona-fide tenants one dollar; and upon all other property situated outside of municipi-

present form.¹⁰⁵ This hypothesis may strike the reader as rank heresy, especially when put forth at a conference on constitutional reform. Indeed, if this were a paper on theology written in an earlier time, the writer suspects that such a statement, contrary to the established wisdom, might make him a fit subject for burning at the stake; for if there is any proposition regarding West Virginia tax policy that has been almost¹⁰⁶ universally accepted by serious writers in the field, it is that TLA is undesirable. Tax limitation has been called negative in approach,¹⁰⁷ unsound in theory,¹⁰⁸ selfish and unconstructive,¹⁰⁹ harmful on balance,¹¹⁰ and just plain dumb.¹¹¹ These comments are only representative samplings. Never-

palities, one dollar and fifty cents; and upon all other such property situated within municipalities, two dollars; and the legislature shall further provide by general law, for increasing the maximum rates, authorized to be fixed, by the different levying bodies upon all classes of property, by submitting the question to the voters of the taxing units affected, but no increase shall be effective unless at least sixty per cent of the qualified voters shall favor such increase, and such increase shall not continue for a longer period than three years at any one time, and shall never exceed by more than fifty per cent the maximum rate herein provided and prescribed by law; and the revenue derived from this source shall be apportioned by the legislature among the levying units of the State in proportion to the levy laid in said units upon real and other personal property; . . . The legislature shall have authority to tax privileges, franchises, and incomes of persons and corporations and to classify and graduate the tax on all incomes according to the amount thereof and to exempt from taxation, incomes below a minimum to be fixed from time to time, and such revenues as may be derived from such tax may be appropriated as the legislature may provide. After the year nineteen hundred thirty-three, the rate of the State tax upon property shall not exceed one cent upon the hundred dollars valuation, except to pay the principal and interest of bonded indebtedness of the State now existing.

¹⁰⁵ Hereafter the property tax limitation amendment will be referred to as TLA.

¹⁰⁶ The word "almost" is used because there have been some writers who have taken a favorable attitude toward tax limitation. *E.g.*, Nelson, *The Case for Tax Limitation*, in *PROPERTY TAX LIMITATION LAWS* 6 (G. Leet and R. Paige ed. 1936).

¹⁰⁷ "Tax limitation smacks rather strongly of a negative approach." Thomas, *Report of the Committee on Property Tax Limitation and Homestead Exemption* in *VIEWPOINTS* 90.

¹⁰⁸ "Our conclusion is that property tax limitation . . . is not in accord with sound tax theory and practice." *Id.* at 89.

¹⁰⁹ "Tax limitation is . . . selfish rather than constructive and in the social interest." P. Kaufman, *On Constitutional Revision and Tax Reform in W. Va., The State We're Still In: A sequel*, March 15, 1966 (essay on file in W.V.U. College of Law Library).

¹¹⁰ "In toto, the disadvantages resulting from the Amendment seem to overshadow greatly the advantages." *NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA* 45.

¹¹¹ "Resort to tax limitation in order to force tax reform seems like a combination of unnecessary effort and bad logic. It suggests the crazy man's way of preventing the bath tub from overflowing by dipping out the water instead of closing the tap." Lutz, *Motives Behind the Tax Limitation Movement*, in *PROPERTY TAX LIMITATION LAWS* 17, 18 (G. Leet and R. Paige ed. 1936).

theless in the current context there are arguments in favor of retaining TLA which at least deserve to be heard and considered.¹¹²

1. Background of TLA

At the beginning of the 1930's a difficult fiscal situation faced the state of West Virginia.¹¹³ Nearly 75 percent of state and local tax revenues were derived from the property tax,¹¹⁴ and much property was assessed at amounts not nearly approximating their true values.¹¹⁵ The tax system was said to rest upon an unsound and inequitable foundation.¹¹⁶

With the coming of the Great Depression many property taxpayers became convinced that farm and home were being taxed unequally to the benefit of other groups.¹¹⁷ These feelings were reinforced when Governor Conley informed the Legislature in 1931 that the ratio of assessed to true value in the state ranged from 8 percent to 705 percent.¹¹⁸ Hard times and high taxes make for popular discontent, and in 1929 a campaign for tax limitation was launched by State Tax Commissioner T. C. Townsend.¹¹⁹ Townsend's plan gathered wide support among the electorate, and in 1932 TLA was submitted by the Legislature to a vote of the people.¹²⁰ The amendment which completely rewrote article X, section 1 of the West Virginia Constitution¹²¹ was overwhelmingly ratified at the Novem-

¹¹² Popular support of TLA is not surprising even though it contravenes the received wisdom. Public opposition to property taxes dates back at least to the time of the Emperor Augustus. Dayton, *Excise Taxes in Their Relationship to Property Taxes*, 46 W. VA. L. REV. 21 (1939).

¹¹³ See generally R. BLAKEY, REPORT ON TAXATION IN WEST VIRGINIA 37-57 (1930).

¹¹⁴ TAX FACTS 6; WEST VIRGINIA STATE AND LOCAL GOVERNMENT 171.

¹¹⁵ See R. BLAKEY, *Supra* note 113, at 11-20, 107-28.

¹¹⁶ *Id.* at 126.

¹¹⁷ C. DAVIS, WEST VIRGINIA'S STATEWIDE REAPPRAISAL PROGRAM 8 (1961) [hereinafter cited as STATEWIDE REAPPRAISAL PROGRAM].

¹¹⁸ *Id.* Tax delinquencies had become widespread during the late twenties and early thirties, thus adding to popular dissatisfaction. H. SHAMBERGER & J. THOMPSON, THE OPERATION OF THE TAX LIMITATION AMENDMENT IN WEST VIRGINIA 13 (1950) [hereinafter cited as OPERATION OF TLA].

¹¹⁹ OPERATION OF TLA 1.

¹²⁰ Acts ch. 10, Ex. Sess. (1932).

¹²¹ The former article X, § 1 found in the Official 1931 W. VA. CODE read as follows:

Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as directed by law. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes; all cemeteries and public property may, by law, be exempted from taxation. The Legislature shall have power to tax, by uniform and equal laws, all privileges and franchises of persons and corporations.

ber, 1932 election.¹²² The arguments that TLA would bring about equalization of assessments, elimination of unnecessary government expenditures, and the inclusion in the tax base of a substantially higher proportion of personal property had won out.¹²³

Ratification of TLA brought on a plethora of problems for the Legislature. It was obvious that TLA would cause a substantial reduction in state and local government revenues, and the Legislature was faced with the problem of passing enabling legislation that would ameliorate the situation.¹²⁴ Before any enabling legislation had been passed, the West Virginia Supreme Court of Appeals had held in *Finlayson v. City of Shinnston* that the term "aggregate of taxes" in TLA meant "all the taxes" including levies for service of bonded indebtedness.¹²⁵ Four days after the decision in *Finlayson*, on March 11, 1933, the Legislature passed and put into immediate effect the first¹²⁶ of three enabling acts which were to produce a series of decisions which are probably among the most fascinating to be found in the West Virginia Reports. This statute authorized the various levying bodies to impose the levy necessary for current expenses to the extent of the maximum levies provided in TLA, and to lay additional levies outside the maximum limits to meet requirements of "now-existing" indebtedness.¹²⁷ The act was successfully challenged in *Bee v. City of Huntington*.¹²⁸ The court held that to allow the maximum levies to be used solely for current purposes would defeat the clear intent of the people in ratifying TLA. This presented the Legislature and the local units of government with a substantial problem, since the court had previously stated that the limitations of TLA could not be taken to impair the obligation of contracts on indebtedness of local governments or the state existing

¹²² The vote was 335,482 in favor to 43,931 against. OPERATION OF TLA 1 n.2. The total vote cast in the gubernatorial election of that year was 748,225. *Id.* at 1 n.3. It is ironic that Townsend who had been the driving force behind the TLA movement was defeated in his bid for the governorship that year. *Id.* at 1.

¹²³ See NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 45.

¹²⁴ Total property taxes levied in the state for 1933 amounted to \$27.2 million. For 1932 the figure had been \$43.8 million. This represented a net decrease of 37.94%. STATE TAX COMMISSIONER, FIFTEENTH BIENNIAL REPORT 993-94 (F. Fox 1934).

¹²⁵ 113 W. Va. 434, 437, 168 S.E. 479, 480 (1933). TLA had earlier been upheld against an attack based on the ground that the procedure in passing it had been invalid. *Herold v. Townsend*, 113 W. Va. 319, 169 S.E. 74 (1933).

¹²⁶ Acts ch. 38, Reg. Sess. (1933).

¹²⁷ *Id.* § 13.

¹²⁸ 114 W. Va. 40, 171 S.E. 539 (1933).

prior to TLA.¹²⁹ The Legislature was therefore faced with the dilemma of enacting an enabling statute within the vague confines of the *Bee* case that would prevent impairment of contracts of the state and local governments, and at the same time provide sufficient revenues for current governmental expenses. The really acute problem presented was for the local governments, since the property tax was their main source of revenue.

Apparently taking a cue from a suggestion by Judge Hatcher in his opinion on rehearing *Bee* to the effect that the state might assume the pre-TLA county road debts,¹³⁰ the Legislature enacted a second enabling act.¹³¹ This statute provided for appropriation of state funds for debt service requirements of various local governmental units.¹³² Again the court found the legislative effort unconstitutional, this time as in violation of article X, section 6 of the state constitution.¹³³

Finally, the Legislature passed a third enabling act.¹³⁴ This provided that 70 percent of levies should be allocated for current expense purposes of the local units of government, 30 percent should, if needed, be allocated to service of pre-TLA debt, and if the latter was not sufficient for pre-TLA debt service, revenues sufficient to make up the difference could be levied outside the limits of TLA. This plan was upheld in *Wilson v. County Court*,¹³⁵ thus putting an end to this rather extraordinary odyssey. The basic plan of the third statute (with modifications in the current expense to debt ratio and other adjustments) is still in effect.

2. Effects of TLA

It would be a gross understatement to say that TLA had a profound effect on the West Virginia tax structure and its government. As a result of TLA, local units suffered a drastic reduction in

¹²⁹ *Finlayson v. City of Shinnston*, 113 W. Va. 434, 439, 168 S.E. 479, 481 (1933); *Dickinson v. Talbott*, 114 W. Va. 1, 8, 170 S.E. 425, 428 (1933). Creditors on pre-TLA debts are entitled to the benefits of the tax structure as it existed at the time of the adoption of TLA. *Appalachian Power Co. v. City of Huntington*, 115 W. Va. 588, 177 S.E. 434 (1934).

¹³⁰ *Bee v. City of Huntington*, 114 W. Va. 40, 69-70, 171 S.E. 539, 552 (1933).

¹³¹ Acts ch. 62, 2d Ex. Sess. (1933).

¹³² *Id.* § 1.

¹³³ *Berry v. Fox*, 114 W. Va. 513, 172 S.E. 896 (1934). See text accompanying notes 75-80 *supra*.

¹³⁴ Acts ch. 67, 2d Ex. Sess. (1933).

¹³⁵ 114 W. Va. 603, 175 S.E. 224 (1934).

property tax levies, their principal source of revenue. Because the local governments found themselves unable to finance adequately all their pre-TLA activities, several formerly local functions were taken over by the state. The public schools were reorganized into a county-unit system,¹³⁶ and 400 local school districts were abolished in favor of 55 county school units.¹³⁷ State aid to schools was increased substantially.¹³⁸ In addition, the county road system was incorporated into the state system, and the state assumed responsibility for it.¹³⁹ Furthermore, the state has assumed the greater part of the responsibility for public assistance and welfare.¹⁴⁰ Thus TLA has resulted in a general shift of responsibility away from local units, and centralization of functions in the state government.¹⁴¹

There has also been a shift since TLA away from dependence on the property tax as a means of financing services, and toward indirect taxes, mostly of the sales tax variety.¹⁴² This was necessitated by the fact that the state had assumed responsibility for so many formerly local functions. In 1933 alone, the state enacted a store tax,¹⁴³ a racing tax,¹⁴⁴ a beer tax,¹⁴⁵ and a consumers sales tax.¹⁴⁶ In addition there was a broadening of the business and occupation tax base and an increase in the rates.¹⁴⁷ The latter was the most productive financial measure enacted by the Legislature in 1933, and it captured most of the revenue lost as a result of TLA.¹⁴⁸ A state personal income tax law was enacted in 1935,¹⁴⁹ but was repealed in 1943.¹⁵⁰

¹³⁶ Acts ch. 8, Ex. Sess. (1933).

¹³⁷ WEST VIRGINIA STATE AND LOCAL GOVERNMENT 265.

¹³⁸ TAX FACTS 10; WEST VIRGINIA STATE AND LOCAL GOVERNMENT 267.

¹³⁹ Acts ch. 40, Ex. Sess. (1933); TAX FACTS 45.

¹⁴⁰ Acts ch. 1, Ex. Sess. (1936); OPERATION OF TLA 7; TAX FACTS 45.

¹⁴¹ OPERATION OF TLA 7; NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 45.

¹⁴² See TAX FACTS 5-6; WEST VIRGINIA STATE AND LOCAL GOVERNMENT 171-73.

¹⁴³ Acts ch. 36, Reg. Sess. (1933).

¹⁴⁴ Acts ch. 47-48, Ex. Sess. (1933).

¹⁴⁵ Acts ch. 61, 2d Ex. Sess. (1933).

¹⁴⁶ Acts ch. 66, 2d Ex. Sess. (1933). The consumers sales tax was originally enacted as a temporary measure. Like so many other "temporary" measures it soon became a permanent part of the tax structure. See Acts ch. 108, Reg. Sess. (1937); WEST VIRGINIA STATE AND LOCAL GOVERNMENT 172.

¹⁴⁷ Acts ch. 33, Ex. Sess. (1933). This includes what is now known as the carrier income tax appearing at W. VA. CODE ch. 11, art. 12A (Michie supp. 1968).

¹⁴⁸ See STATE TAX COMMISSIONER, SIXTEENTH BIENNIAL REPORT at viii (F. Fox 1936); WEST VIRGINIA STATE AND LOCAL GOVERNMENT 171-72.

¹⁴⁹ Acts ch. 89, Reg. Sess. (1935).

¹⁵⁰ Acts ch. 96, Reg. Sess. (1943). Apparently the proponents of TLA contemplated enactment of an income tax to make up for at least part of the

Through the years many indirect taxes have been enacted as revenue needs arose.¹⁵¹ The result has been a tax system heavily dependent upon various forms of sales taxation and, as a consequence, highly regressive in nature.¹⁵² It has been argued that TLA has been a primary cause of this heavy dependence on regressive sales taxation in West Virginia.¹⁵³ This may be so, but it is equally arguable that the state's tax system would be regressive even in the absence of TLA. A graduated income tax was specifically authorized by TLA, but has never become the substantial revenue producer that it could. The writer believes that the reason for this lies more in the political and economic climate of the state than in the specific strictures of TLA.¹⁵⁴ A tax is much less onerous in the mind of the taxpayer when he pays it in small amounts over the course of many transactions, such as is the case with a general sales tax, or when it is barely visible as in the case of liquor and cigarette taxes, than it is when required to be paid in large chunks, such as often occurs with an income tax even where a system of withholding is in effect.¹⁵⁵ Since officials interested in re-election naturally want to keep the people happy, the more visible a particular tax is, the less favor it will probably receive among legislators. Furthermore, some particular forms of sales tax have a special appeal, such as gasoline taxes justified on a benefit principle, and cigarette, racing and alcoholic beverage taxes said to be "deterrents to vice."

3. Operation of TLA and Its Enabling Legislation

The operation of TLA and its enabling legislation¹⁵⁶ is exceed-

revenue loss resulting from TLA, since the amendment specifically authorized the legislature to enact a graduated income tax. Compare the pre-TLA provision *supra* note 121 with the present one *supra* note 104. See OPERATION OF TLA 13. Of course the state now does have a graduated personal income tax. W. VA. CODE ch. 11, art. 21 (Michie 1966).

¹⁵¹ See W. VA. CODE ch. 11 *passim* (Michie 1966).

¹⁵² See OPERATION OF TLA 15-17; TAX FACTS 4-8; TAX STUDY COMMISSION SECOND REPORT 8-10; TAX STUDY COMMISSION FINAL REPORT 43-47; Papke Report, Aug. 22, 1966 at 1. See generally STATE TAX COMMISSIONER, THIRTY-SECOND BIENNIAL REPORT 1-34 (C. Lantz 1968).

¹⁵³ E.g., OPERATION OF TLA 12.

¹⁵⁴ Cf. Jacob, *Dimensions of State Politics*, in STATE LEGISLATURES IN AMERICAN POLITICS 1-36 (American Assembly, A. Heard ed. 1966).

¹⁵⁵ How many people are able to come even close to correctly estimating the amounts they pay in general sales, cigarette, gasoline and like taxes? One usually hears others complaining about sales taxes only when they have recently made a rather large purchase, and they become aware of the size of the tax on the transaction.

¹⁵⁶ W. VA. CODE ch. 11, art. 8 (Michie 1966). This article is grounded on TLA. *Greene Line Terminal Co. v. Martin*, 122 W. Va. 483, 492, 10 S.E.2d 901, 906 (1940).

ingly complex. A full treatment of the legal technicalities and ramifications of administration of the property tax under TLA is beyond the scope of this paper. Nevertheless, a brief resume of the essentials will be presented.

The amendment provides for grouping of property into four classifications for purposes of taxation, with the maximum aggregate levies permissible for each classification enumerated in its body.¹⁵⁷ The enabling legislation denominates these classifications as Class I, Class II, Class III and Class IV.¹⁵⁸ Because TLA imposes its limitations on the *aggregate* of taxes levied, it is necessary to allocate the maximum rates specified in the amendment among the various taxing units.¹⁵⁹ This is accomplished by a series of sections in chapter 11, article 8 of the Code.¹⁶⁰ Initially, allocations are generally divided between levies for pre-TLA debt and levies for current expenses of each local governmental unit, but there is provision for use of the debt allocation for current expenses, where it is not needed for the former purpose.¹⁶¹ In the case of county

¹⁵⁷ W. VA. CONST. art. X, § 1.

¹⁵⁸ W. VA. CODE ch. 11, art. 8, § 5 (Michie 1966). The classes are as follows:

Class I—Personal property used exclusively in farming; products of farming, including livestock; notes, bonds, and accounts receivable; stocks and any other intangible personal property.

Class II—Owned-occupied homes and farms, and farms operated by tenants;

Class III—All other real and personal property located outside municipalities;

Class IV—All other real and personal property located inside municipalities.

In *Green Line Terminal Co. v. Martin*, 122 W. Va. 483, 10 S.E.2d 901 (1940), it was held that leaseholds (which might conceivably come under Class I) were to be taxed under Class III or Class IV depending upon the location of the leased property. W. VA. CODE ch. 11, art. 8, § 6 Michie (1966) enacts the rate limitations specified by TLA for the various classes. These are (per \$100 assessed valuation):

Class I— \$.50

Class II— 1.00

Class III— 1.50

Class IV— 2.00

¹⁵⁹ W. VA. CODE ch. 11, art. 8, § 4 (Michie 1966) defines the taxing units as follows:

(1) the State, (2) the county, for all county purposes including indebtedness other than school indebtedness, (3) present school districts for current school purposes, (4) school districts existing prior to the twenty-second day of May, one thousand nine hundred thirty-three, for school debt service purposes, (5) magisterial and other road districts for road and other debt service purposes other than county road debts, (6) other specially created taxing districts for indebtedness existing at the time of the adoption of the Tax Limitation Amendment, (7) municipalities for municipal purposes including municipal debt service purposes.

boards of education there is, in addition, an allocation for the permanent improvement fund and for post-TLA bonded indebtedness; but again there is provision for use of these levies for current expense purposes where they are not needed for the former purposes.¹⁶² There are also provisions for shifting of allocated levies between county courts and county boards of education.¹⁶³

It will be noted that although TLA sets out four classifications of property, in practice the limitations result in three different rates. A basic rate is applied to Class I property, twice the Class I rate is applied to class II property, and four times the basic rate is applied to Classes III and IV. Classes III and IV property are the same kind of property, and are distinguishable only on the basis of location. It should also be noted that because of the structure of the TLA classifications, property in Classes I and II located outside of municipalities has not borne the full 50 cents and 1 dollar aggregate maximum rates contemplated by TLA.¹⁶⁴

¹⁶⁰ W. VA. CODE ch. 11, art. 8, §§ 6a-6d (Michie 1966). The Allocations provided are:

RATES PER \$100 ASSESSED VALUATION STATED IN CENTS

PURPOSES	Class I	Class II	Class III	Class IV	Total
STATE CURRENT	.25	.50	1.00	1.00	2.75
Total State	.25	.50	1.00	1.00	2.75
COUNTY CURRENT	11.90	23.80	47.60	47.60	130.90
COUNTY DEBT	.25	.50	1.00	1.00	2.75
DISTRICT DEBT	2.15	4.30	8.60	8.60	23.65
Total County and District	14.30	28.60	57.20	57.20	157.30
SCHOOL CURRENT	21.10	42.20	84.40	84.40	232.10
SCHOOL DEBT	.35	.70	1.40	1.40	3.85
SCHOOL PERMANENT IMPROVEMENT	1.50	3.00	6.00	6.00	16.50
Total School	22.95	45.90	91.80	91.80	252.45
MUNICIPAL CURRENT	11.00	22.00	—	44.00	77.00
MUNICIPAL DEBT	1.50	3.00	—	6.00	10.50
Total Municipal	12.50	25.00	—	50.00	87.50
GRAND TOTAL IN CENTS	50.00	100.00	150.00	200.00	500.00

See STATE TAX COMMISSIONER, THIRTY-SECOND BIENNIAL REPORT 33-34 (C. Lantz 1968). It can be noted that the state share of property tax allocations is negligible. Total property tax collections for the state in 1967 were \$406,695. *Id.* at 736.

¹⁶¹ W. VA. CODE ch. 11, art. 8, § 7 (Michie 1966). See *Appalachian Power Co. v. County Court*, 146 W. Va. 118, 122, 118 S.E.2d 531, 533-34 (1961).

¹⁶² W. VA. CODE ch. 11, art. 8, § 6c (Michie 1966)

¹⁶³ *Id.* §§ 6b-6c.

In addition to the rates set out in TLA, there is also provision for increasing levies by a maximum of fifty percent of the rates authorized by law for a period of up to three years upon a favorable vote of at least 50 percent of the qualified voters.¹⁶⁵ Moreover, under the better schools amendment adopted in 1958, school districts are authorized to lay excess levies of up to 100 percent of the maximum authorized rates, upon a favorable 50 percent vote.¹⁶⁶ It also permits levies to service bonded indebtedness of up to 5 percent of the assessed value of the taxable property in the district to be laid outside the maximum rates allocated to them by law

¹⁶⁴ The ratio of 1:2:4 was upheld in *Wilson v. County Court*, 114 W. Va. 603, 175 S.E.2d 224 (1934).

Since classes III and IV were the same except for location, a dispute arose following enactment of TLA as to whether or not these tax limits violated the constitutional requirement of uniform treatment relative to Classes I and II. Attorney General Homer Holt felt that they did. In order to overcome this possible defect the enabling legislation in effect, classified Classes I and II properties according to location also, and fixed the rate limits on such property outside municipalities in the same ratio to the limits on property inside municipalities that \$1.50 bears to \$2.00 (the ratio of the maximum for Class III to that for Class IV). Therefore, the effective maximum aggregate rates are as follows (per \$100 assessed valuation):

Class	Outside Municipalities	Inside Municipalities
I	\$.375	\$.50
II	.75	1.00
III	1.50	—
IV	—	2.00

E. HANCZARYK & J. THOMPSON, *THE ECONOMIC EFFECT OF STATE AND LOCAL TAXATION IN WEST VIRGINIA* 34 (1958). Since the maximum rates set by TLA for Classes III and IV provide for the added burden imposed by municipal taxes on property within municipalities, and classes I and II do not, it was thus necessary in the enabling legislation allocating Class I and II rates to take this into account. As a result, Class I and II property located outside municipalities has had to bear only three-fourths of the maximum aggregate rates contemplated by TLA. See *Tax Facts* 2-3.

¹⁶⁵ W. VA. CONST. art. X, §1; See W. VA. CODE ch. 11, art. 8, § 16 (Michie 1966). The phrase "sixty percent of the qualified voters" was held to mean 60% of those voting and not 60% of all registered voters in *Warden v. County Court*, 116 W. Va. 695, 183 S.E. 39 (1935). The 60% requirement was declared unconstitutional by the West Virginia Supreme Court of Appeals shortly before this article went to press on the basis of the "one man, one vote" line of cases following *Baker v. Carr*, 369 U.S. 186 (1962). *Lance v. Board of Education, The Syllabus Service*, Vol. XXXVI, No. 17 (July 8, 1969). See *Kirkpatrick v. Preisler*, 399 U.S. 127 (1971); *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹⁶⁶ W. VA. CONST. art. X, § 10. For brief explanations of the amendment see Dadisman, *Four Proposed Constitutional Amendments*, 60 W. VA. L. REV. 303, 309-11 (1958); WEST VIRGINIA STATE AND LOCAL GOVERNMENT 271. The better schools amendment is in effect an amendment to TLA.

under TLA.¹⁶⁷ This substantially increases the taxing power of the school districts, provided the requisite number of voters are willing. There is, therefore, some although, admittedly, not a great degree of flexibility in TLA.

4. *Current Policy Aspects of TLA*¹⁶⁸

Property tax limitations in general, and the West Virginia TLA in particular have not been popular with writers on government finance. In fact, they have been extremely unpopular.¹⁶⁹ One might attribute this attitude to what could be termed knee-jerk liberalism; but that would be too facile, and an ad hominem argument besides. Again, one might ascribe it to the academic penchant for sneering at the conventional wisdom, all the while manufacturing another species of the same thing; but that also would be too easy. One reason that might be plausible is that tax limitation was a burning issue in earlier days when the situation was quite different than at present. Much (but not all) of the literature on the question of property tax limitation which the writer has found, is somewhat dated, and it might therefore be said that the issues they considered under the label of property tax limitation were not the same as

¹⁶⁷ W. VA. CONST. art. X, § 10. For example if the assessed value of property in the district is \$10 million, the district can levy taxes outside the limits allocated to it under TLA in order to service up to \$500 thousand in bonded indebtedness. See W. VA. CONST. art. X, § 8; W. VA. CODE ch. 13, art. 1, §§ 4(m), 34; 48 W. VA. OP. ATTY. GEN. 84, 86 (1959); WEST VIRGINIA STATE AND LOCAL GOVERNMENT 271. The example assumes, of course, that the district has obtained authorization to issue the bonds under W. VA. CONST. art. X, § 8.

Following adoption of the better schools amendment the Legislature authorized other local units to levy outside the maximum rates for purposes of servicing bonded indebtedness. See W. VA. CODE ch. 13, art. 1, § 35. This statute was held unconstitutional in *Appalachian Power Co. v. County Court*, 146 W. Va. 118, 118 S.E.2d 531 (1961), *commented on*, 63 W. VA. L. REV. 357 (1961). Some local government units have managed to circumvent the bonded indebtedness limitations of W. VA. CONST. art. X, § 8 by issuing self-liquidating revenue bonds. See, e.g., *State ex rel County Court v. Demus*, 148 W. Va. 228, 135 S.E.2d 352 (1964) (industrial development bonds) *commented on*, 67 W. VA. L. REV. 228 (1965); *Brewer v. Point Pleasant*, 114 W. Va. 572, 172 S.E. 717 (1934); *Casto v. Town of Ripley*, 114 W. Va. 668, 173 S.E. 886 (1934); *Cf. State ex rel Bd. of Governors v. O'Brien*, 142 W. Va. 88, 94 S.E.2d 446 (1956).

¹⁶⁸ In this portion of the paper the writer has leaned heavily (perhaps it would be more accurate to say the writer has used it as a crutch) on D. NETZER, *IMPACT OF THE PROPERTY TAX: ITS ECONOMIC IMPLICATIONS*, STUDY FOR NATIONAL COMMISSION ON URBAN PROBLEMS printed by Jt. Econ. Comm., 90th Cong., 2d Sess. (Comm. Print 1968) [hereinafter cited as *IMPACT OF THE PROPERTY TAX*]. Former Senator Paul H. Douglas of Illinois is chairman of the National Commission on Urban Problems. The writer makes no claims to being an economist or economic researcher. Therefore, most of the data presented here is taken from secondary sources.

¹⁶⁹ See, e.g., Notes 107-11 *supra*.

the ones that are relevant today. But even this analysis does not explain some of the more recent statements in opposition to tax limitation.¹⁷⁰ Perhaps, it can most satisfactorily be explained on the basis of an even more fundamental attitude toward the most desirable role of government in a society, and the degree of control to which government should be subject in exercising its functions. It seems that a favorable attitude toward strong government, free to operate over a relatively wide range would naturally lead to a position of opposition to measures such as tax limitation.¹⁷¹ Such an attitude evidences a confidence and faith in public officialdom which the present writer does not share.

Being in favor of TLA is, in the minds of some, equivalent to being against the property tax (which is probably true); and being against the property tax is in turn considered equivalent to being against education (which is probably not true), because a substantial amount of revenues for public school support are derived from the property tax. The reasoning seems to be that opposition to an increase in any tax which will provide additional money for education is the same thing as being against education itself.¹⁷² Being against

¹⁷⁰ See, e.g., P. Kaufman, *Supra* note 109, at 3, 6-7; TAX FACTS 19.

¹⁷¹ See, e.g., Landers, *Taxation and Finance*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 225-26 (W. B. Graves ed. 1960):

It is difficult to reconcile a position demanding a series of constitutional prohibitions or limitations upon the legislature's exercise of discretion in respect to taxation and finance with a real belief in democracy.

It might be argued back that one could use the same reasoning to oppose any constitutional limitation on legislative power, not just limitations in the area of taxation and finance. One might also question the sense in which the author of the quoted sentence uses the word democracy. Does he mean letting the mob have its will? Or does he mean limited representative government? If he means the former, this writer does not buy it; if the latter his opposition to limits on legislative action is inconsistent with his concept of democracy.

¹⁷² In 1945 a study of the West Virginia educational system recommended more money for schools raised at the local level, presumably from the property tax. G. STRAYER, A REPORT OF A SURVEY OF PUBLIC EDUCATION IN WEST VIRGINIA 571-72 (1945). It also recommended an increase in property assessments. *Id.* at 541, 561. For a short discussion of the problem of school support in West Virginia in light of the *Strayer Report*, see Colson, *Taxation and School Support in West Virginia*, 50 W. VA. L. REV. 1 (1946).

The whole attitude that more money is the be-all and end-all solution to the problem of better public education has always left this writer somewhat cold. Perhaps it is traceable to a desire on the part of officials in charge to have something tangible to show for their efforts. A spanking new school building complete with gymnasium, athletic field, modern home economics equipment, and plenty of cars for driver education courses is a quite visible accomplishment; by contrast a student who is knowledgeable in literature or philosophy usually is not so noticeable. Maybe more attention should be paid to the idea that a good school is a man on one end of a log and a little boy on the other. As for equipment, a reintroduction of paddles and dunce-caps would be a good start. Admittedly this is a biased opinion from one who

education is somewhat similar in social acceptability to being against motherhood and for sin, so the proponent of TLA usually finds himself at a rhetorical disadvantage. Nevertheless an attempt will be made here to justify TLA.¹⁷³

a. The Concept of the Property Tax

One rationale for the property tax that can be made is by reference to history. It has had a long and not entirely unsuccessful history in this country, and has for many years been the revenue mainstay of local governments.¹⁷⁴ It does have some advantages: (1) a tax on real estate does not in most cases easily escape the tax collector; (2) assessment and collection tend to lend themselves to local administration; and (3) it is relatively stable as a revenue producer.¹⁷⁵

Nevertheless an impressive case can be made against the use of property taxation. The property tax can in reality be viewed as two distinct forms of taxation. First, it is a tax on residential property and consumer owned personal property. Second, it is a tax on real property and personal property used in business and agriculture.¹⁷⁶ When viewed in this manner the analysis takes on a different complexion than when the property tax is looked upon as a unitary entity.

favors phonics in the teaching of reading and spelling, and corporal punishment in discipline cases. On the other hand "progressive" education has had a long test period in this country, and look at the results it has produced. Many schools and universities have become settlement houses, playpens, or centers of disruption. In the light of these developments a good instrumentalist like John Dewey might be tempted to retest his hypothesis.

Another thesis that merits reconsideration is the idea that everyone (or almost everyone) should obtain a secondary or higher education. The secondary schools and colleges today are packed with alleged "students" who have no business there. They are either not bright enough to learn the required subject matter, too lazy, or both. When everyone has a Phd., a Phd. will be worth about as much as a German Mark was in 1923.

¹⁷³ Some of the principal criticisms of TLA have been listed as follows:

1. creation of a regressive system of taxation;
2. curtailment of vital services;
3. failure to provide for changing government needs, and for varying conditions among local governments;
4. negative and indirect as a method of securing tax reform;
5. failure to reduce the local tax burden;
6. reduction in local control of government. OPERATION OF TLA 15-19.

¹⁷⁴ J. HELLERSTEIN, *supra* note 52, at 2.

¹⁷⁵ *Id.* at 7.

¹⁷⁶ IMPACT OF THE PROPERTY TAX 12.

b. Property Tax as a Housing Consumption Tax

In 1962 roughly half of property tax revenues in standard metropolitan statistical areas in the United States (hereafter referred to as SMSA's) came from taxes on residential housing.¹⁷⁷ In West Virginia the comparable figure was probably considerably less. In 1967, the last year for which figures are available, taxes levied on Class II property (consisting mostly of owner occupied residences) amounted to about 18 percent of the total property taxes levied on all classes of property.¹⁷⁸

Viewed realistically, the property tax revenue which comes from taxes on housing is equivalent to a consumer expenditure tax on housing; in other words a sales tax on housing.¹⁷⁹ If we approach the housing property tax from this angle we can determine the rate of such a sales tax. For example, a tax of three cents on a 1 dollar purchase would amount to a sales tax rate of 3 percent. During 1962 housing property taxes in SMSA's amounted to 24 percent of cash expenditures by owners and renters for housing.¹⁸⁰ If we consider the cash expenditures for housing as the purchase price paid for housing, it is easy to see that the housing property tax is equivalent to a 24 percent sales tax on housing.¹⁸¹ A 24 percent

¹⁷⁷ *Id.* at 12-13.

¹⁷⁸ See STATE TAX COMMISSIONER, THIRTY-SECOND BIENNIAL REPORT 469 (C. Lantz 1968). Total property taxes levied amounted to \$112,767,157 while taxes levied on Class II property totaled \$20,808,920. *Id.* The 1966 figures were comparable. *Id.* at 467. It should be noted that these figures are not strictly comparable to those given for SMSA's. The reason for this is that Class II West Virginia property includes only owner occupied residential housing while the SMSA statistics include rental housing, which is taxed at a higher rate, in Class III or IV in West Virginia. Still, it appears that West Virginia housing property taxes are a considerably lower percentage of total property taxes than those in SMSA's.

¹⁷⁹ See IMPACT OF THE PROPERTY TAX 13.

¹⁸⁰ *Id.* The cash expenditure component of the percentage computation excludes cash paid out for taxes. This is comparable to the way sales tax rates are determined. The writer has been unable to obtain parallel statistics for West Virginia. Judging from the data at note 178 *supra*, it is likely that the comparable percentage for West Virginia is significantly lower. That is, property taxes paid in West Virginia are probably a much lesser percentage of cash expenditures for housing in the state than they are for SMSA's.

¹⁸¹ This discussion assumes that the incidence of housing property taxes falls on the occupier of the housing. Incidence of a tax has been defined as "the final resting place of the burden of the tax." V. ALVIS, THE WEST VIRGINIA GROSS SALES TAX 50 (1960). See R. MUSGRAVE, PUBLIC FINANCE 230-31 (1959); E. SELIGMAN, THE SHIFTING AND INCIDENCE OF TAXATION 14-15 (5th rev. ed. 1927). The impact of a tax (as opposed to the incidence) denotes the location of the initial burden of the tax. V. ALVIS, *Supra* at 50. If one who bears the impact of a tax is able to cause its incidence to fall on another he is said to have shifted the tax. Shifting is the process;

tax on housing is an undesirable situation by almost anyone's standards. It means families must pay directly if they are owner occupants, or via their rents if tenants, large increments in their housing costs on account of the taxes.¹⁸²

If the situation is less onerous in West Virginia as the data would seem to indicate, it may well be because TLA has forced the state and local governments to look for other sources of revenue. There seems to be a tendency among local governments to push property taxes to the limit.¹⁸³ That limit may be either legal or economic in nature. If it is the latter, property taxes are likely to rise to a much higher level than if there is a legal limitation, and may in fact rise beyond the point of economic tolerance. For example, in fiscal year 1966 property tax revenues of the state and local governments in West Virginia per \$1,000 of personal income amounted to \$26.64. In Massachusetts where local governments traditionally depend heavily on property taxes, the parallel figure was \$62.42. On a per capita basis the amounts were \$188.82 for Massachusetts and \$54.06 for West Virginia.¹⁸⁴ Most of the other states show higher property tax figures than West Virginia.¹⁸⁵ The implications for the housing consumption tax analysis are obvious. West Virginians suffer less from this onerous tax than residents of most other states, and it is highly probable that TLA has been largely responsible for this situation.

The very high tax rates of housing property taxes when analyzed in this manner are greatly in excess of other forms of taxation of consumer expenditure, with the exception of the "vice" taxes on liquor and tobacco and the "benefit" taxes on gasoline.¹⁸⁶ If we were to start out in a vacuum to devise a tax system it is hardly possible that we would even consider such a heavy tax on housing

incidence is the result. See E. SELIGMAN, *supra* at 14-15. There seems to be a fair degree of agreement that the incidence of housing property taxes is borne by the occupiers. See E. HANCZARYK & J. THOMPSON, *THE ECONOMIC IMPACT OF STATE AND LOCAL TAXES IN WEST VIRGINIA* 35; *IMPACT OF THE PROPERTY TAX* 16 (over 90% of property taxes on housing are borne by housing occupants); Heer, *The Property Tax as a Measure of Ability to Pay*, in *VIEWPOINTS* 49, 50.

¹⁸² *IMPACT OF THE PROPERTY TAX* 17.

¹⁸³ See *Id.* at 6-11.

¹⁸⁴ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1967 CENSUS OF GOVERNMENTS VOL. 2, TAXABLE PROPERTY VALUES Table 1 at 27. The writer has heard it said that in Massachusetts one does not own property; he leases it from the state.

¹⁸⁵ *Id.*

¹⁸⁶ *IMPACT OF THE PROPERTY TAX* 18.

consumption. More likely we would consider an exemption from taxation for housing.¹⁸⁷

From the standpoint of regressivity the housing property tax looks even worse. In the aggregate for the country as a whole, the incidence of the property tax appears to be roughly proportional to income.¹⁸⁸ However, this aggregate fails to take into account the important distinctions between nonresidential or business property taxes, and housing property taxes. There is evidence to indicate that the incidence of the tax on owner occupied residential housing is regressive; and that it is even more so in the case of rented property.¹⁸⁹ For the lower income groups the situation is even more distressing. For them the housing property tax is heavily regressive, absorbing a substantial proportion of their incomes.¹⁹⁰ One reason for this is that housing constitutes a larger percentage of the budgets of lower than of higher income groups.¹⁹¹ It is ironic that some of the "liberals" among us who purport to have a high concern and sympathy for the problems of lower income groups should often favor eliminating a legal limitation on a tax that hits those groups so heavily.

c. *Tax on Business Property*

The tax on business property differs from other business taxes in that it is a tax on inputs (land and capital) rather than on income or gross receipts, as is the case with most business taxes. This makes the impact of the tax greater on businesses which use a high ratio of capital relative to output and thus violates the principles

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 31.

¹⁸⁹ D. NETZER, *ECONOMICS OF THE PROPERTY TAX* 40 (1966).

¹⁹⁰ *IMPACT OF THE PROPERTY TAX* 18. Netzer gives the following representative figures (using 1959-60 data):

Income	Housing Property Tax as Percent of Income
Under \$2000	8.5%
\$2000-\$3000	3.9%
\$3000-\$4000	3.0%
\$4000-\$5000	2.5%
\$5000-7000	2.1%
7000-\$10000	1.8%
\$10,000-\$15,000	1.6%
over \$15,000	1.4%
Id. Table 11 at 19.	

¹⁹¹ *Id.* at 12.

of horizontal equity and neutrality.¹⁹² Furthermore, the tax on business property possesses similarities to general consumption taxes because much of it is shifted forward to consumers. Therefore the tax is regressive, at least up to an income level of \$10,000.¹⁹³ Since regression is generally considered undesirable, this aspect of the business property tax makes it much less attractive, and again TLA can be credited with holding down a bad effect.

d. Some Tentative Conclusions Regarding TLA

The preceding arguments with regard to TLA have been based on the concept of the property tax as harmfully regressive and TLA as limiting this regressivity. It might be argued back that TLA had nothing to do with retarding regressive taxation in West Virginia, and in fact even promoted it by necessitating heavy dependence on forms of sales taxation.¹⁹⁴ This may or may not be true; but the fact is that it is not relevant to the present situation. It appears that sales taxation has just about reached its limit of endurance in this state. In 1954 the Governor's Commission on State and Local Finance came to the conclusion that if new revenues were necessary for West Virginia it must:

[E]ither rely more heavily upon property; go still more heavily into sales; or adopt a program of personal corporate and income taxes.¹⁹⁵

This statement continues true today. If TLA remains and sales taxation has reached the saturation point, what is left but a program of income taxation? And it is submitted that greater use of the federally conformed personal and corporate income taxes now existing, with *moderately*¹⁹⁶ graduated rates is the preferable direction to go in the way of taxation. At the same time it should be remembered that the area of action available in the matter of state and local taxation is quite limited on account of the role of the federal government in the field of revenue gathering. Ultimately a system of block grants may be the only solution to the problem of maintaining the vitality of the state and local governments.¹⁹⁷

¹⁹² *Id.* at 12, 35.

¹⁹³ *Id.* at 31.

¹⁹⁴ See text accompanying notes 142-155 *supra*.

¹⁹⁵ TAX FACTS 7.

¹⁹⁶ The word *moderately* is used because it seems the federal government has fairly well pre-empted the field of highly progressive taxation.

¹⁹⁷ See text accompanying notes 96-101 *supra*.

The writer is well aware that resort to tax limitation has been criticized as a back door approach to tax reform.¹⁹⁸ There is no doubt that it is.¹⁹⁹ But the fact remains that it is better to get in through the back door than be locked out of the house. Raising the property tax as a way of gaining more revenues would be positively detrimental to the state. The brunt of such an increase would be borne by the middle and lower income groups within West Virginia. It is no secret that the working people throughout the country are becoming less tolerant toward all forms of taxation. Increases in property taxes which are payable in highly visible lump sums would do nothing to alleviate that feeling. The much abused middle class would feel even more abused.

A study for the National Commission on Urban Problems has concluded:

[T]he highest priority would seem to attach to de-emphasis of the property tax *per se*. It is a generally inferior tax instrument, although not the worst of all possible taxes. But an inferior tax becomes a monstrous one if applied at high enough rates.²⁰⁰

¹⁹⁸ See note 111 *supra*.

¹⁹⁹ The idea of using back door approaches raises some interesting questions. If the temporary elimination of exemptions from the sales tax in West Virginia is allowed to run out, what will the Governor recommend to take its place? Might he ask for a raise in the ratio of assessed to appraised value required by W. VA. CODE ch. 18, art. 9A, § 15 from 50% to some higher figure, thereby accomplishing the sleight-of-hand feat of "raising taxes without raising taxes" as was done in the sales tax exemption situation? The writer's guess is that this is a distinct possibility, and since an increase in the base of the tax (assessed values) has the same effect as an increase in the rates—more paid by the property taxpayer—the arguments against property taxation and in favor of retention of TLA should be equally applicable to such a plan to increase assessed values.

²⁰⁰ IMPACT OF THE PROPERTY TAX 47. The property tax has many other defects besides the ones discussed above. Among those listed by various writers in the field of public finance are: (1) problems of administration caused, *inter alia*, by difficulties in making accurate valuations, see IMPACT OF THE PROPERTY TAX 33, inequities resulting from poor assessment practices, E. HANCZARYK & J. THOMPSON, THE ECONOMIC IMPACT OF STATE AND LOCAL TAXES IN WEST VIRGINIA 35 (1958), and the ease with which much personal property escapes taxation, *Id.*; (2) occurrence of double taxation when both real and personal property are taxed, for example, corporate stock and the underlying assets of the corporation, *Id.*; (3) deterrence of the making of improvements to property, see IMPACT OF THE PROPERTY TAX 21; G. STERNLIEB, THE TENEMENT LANDLORD 203-24 (1966); (4) general horizontal inequity: "Since consumption of housing is a major determinant of property tax burdens, and since this differs widely within income groups, property tax burdens do in fact differ considerably within income groups." IMPACT OF THE PROPERTY TAX 32; (5) discouragement of investment in and consumption of housing, *Id.* at 19; (6) the placing of a significant part of the existing housing stock out of reach of lower and middle income individuals, *Id.*; and (7) encouragement of poor land use planning, *Id.* at 27. This is not meant to be an exhaustive list.

If this is so, to think of opening up the gates to increasing property taxation in West Virginia by getting rid of TLA (or by any other method, for that matter) would be a large step in the wrong direction.

An increase in the property tax in West Virginia would be an increase in the wrong tax, in the wrong place, at the wrong time.

III. CONCLUSION

An expanded federally based state income tax system coupled with a constitutional change facilitating sharing of revenues by the states with the local governments would represent substantial improvement in the present situation. In addition these do not appear to be unattainable goals. Constitutional change comes about slowly in West Virginia. A formal commission first recommended an executive budget amendment in 1929;²⁰¹ we finally adopted it this past year. But slowness is not altogether bad. Change for its own sake is worthless and even detrimental. Evolution is preferable to revolution. In planning reform there is always the danger that we will lose sight of our own intellectual inadequacies. Thus a substantial degree of caution in matters of reform is a good thing. At the same time, however, we ought to remember Edmund Burke's words, "The only thing necessary for the triumph of evil is for good men to do nothing."²⁰²

²⁰¹ NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 8.

²⁰² Letter to William Smith, Jan., 1795.